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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 718

PEOPLE OF THE STATE OF ILLINOIS, EX REL. CITY OF HIGHLAND PARK, A MUNICIPAL CORPORATION OF ILLINOIS,

Petitioner,

vs.

GEORGE B. McKIBBIN, AS DIRECTOR OF FINANCE OF THE DEPARTMENT OF FINANCE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT.

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THE SUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Supreme Court of the State of Illinois is reported in 380 Ill. 447.

The decree rendered (Rec. 9) on the hearing in the Circuit Court of Cook County which sustained the defendant's motion to dismiss complaint for Writ of Mandamus was entered January 9, 1941.

Jurisdiction.

Respondent submits that this court should not take jurisdiction because no federal question is involved.

RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE.

Petitioner's statement of the facts and of the nature of the proceeding is so very inaccurate as to be entirely misleading. In the first paragraph of the petition, petitioner's counsel says:

> "The City of Highland Park * * * presents this petition * * * to review a decision of the Illinois Supreme Court **denying a tax refund** to the petitioner."

This statement is not true. Petitioner at no time sought, asked, or requested any tax refund whatsoever. (Prayer of petitioner's complaint, Rec. 6.)

What the petitioner **did** seek was a right to have the amount of taxes paid under a statute enacted in 1935 and later held unconstitutional (*City of Chicago* v. *Ames*, 365 Ill. 529) applied **not** as against taxes due under that act, but against taxes to become due in the future **under an act not passed until 1937.**

In other words, all that petitioner actually sought was to have taxes paid under one act, which act was held unconstitutional, credited against taxes to become due under a taxing act passed two years after the enactment of the first act. That petitioner never sought a cash refund is instantly apparent from the following considerations:

The only party respondent to petitioner's petition for writ of *mandamus* was the Director of Finance of the State of Illinois (Rec. 1). In Illinois it is well settled that the court has no jurisdiction to compel disbursements of state funds, the disbursement to be made in actual cash, unless the State Treasurer and State Auditor be made parties to the *mandamus* proceeding. This rule is not questioned. Two late recognitions occur in *People ex rel.*

Markee v. *Barrett* (decided January, 1943), No. 26940, and *People ex rel. Davidson, et al.* v. *Bradley, et al.* (decided January, 1943), No. 26990.

It was not alleged in the complaint, nor is it pretended in this court, that the respondent had any state fund within his possession from which to make disbursement.

Therefore, while several issues were involved, the **only** ultimate question presented to any court of the State of Illinois was whether payment under a *former* statute, which statute was held unconstitutional, entitled the taxpayer to a credit of the amount of such payments against taxes due under a *new and different* taxing act.

SUMMARY OF ARGUMENT.

I.

PETITIONER WAS NOT ENTITLED UNDER THE CONSTITUTION OR OTHERWISE TO CREDIT TAXES PAID UNDER ONE ACT AGAINST TAXES TO BECOME DUE UNDER A LATER ACT.

a. Even if the first Public Utility Tax act were still in force, it would not authorize the crediting of payments made under such first act as against taxes accruing under the subsequent act of 1937, nor does the second act authorize the crediting as against taxes due under that act amounts paid on account of the first act.

b. Even were that section still in existence, it would only permit the recovery of taxes which the legislature did not intend to impose under that act, not taxes which the legislature did intend to impose but failed to impose effectively because the act proved to be unconstitutional.

c. Even assuming that the provisions of Section 6 of the 1935 act were sufficient in scope to justify relief in this type of a case, those provisions were completely obliterated by the Illinois Supreme Court's holding that the act of which they formed a part was unconstitutional and void.

d. Even had Section 6 of the 1935 act survived as an independent enactment, it would have been automatically repealed by the legislature's enactment of a complete new act in 1937.

II.

THE ONLY QUESTIONS DECIDED BY THE SUPREME COURT OF ILLINOIS WERE QUESTIONS OF ILLINOIS STATUTORY LAW. NO QUESTION OF FEDERAL CONSTITUTIONAL LAW WAS PRESENTED TO THE COURTS BELOW, NOR IS ANY SUCH QUESTION PRESENTED HERE.

ARGUMENT.

I.

PETITIONER WAS NOT ENTITLED UNDER THE CONSTITUTION OR OTHERWISE TO CREDIT TAXES PAID UNDER ONE ACT AGAINST TAXES TO BECOME DUE UNDER A LATER ACT.

(a) Even If the First Public Utility Tax Act Were Still in Force, It Would Not Authorize the Crediting of Payments Made Under Such First Act as Against Taxes Accruing Under the Subsequent Act of 1937, Nor Does the Second Act Authorize the Crediting as Against Taxes Due Under That Act Amounts Paid on Account of the First Act.

The "original" or *first* Public Utility Tax act, passed in 1935 (Laws of Illinois, 59th General Assembly), imposed a tax measured by the gross receipts from the sale of gas, water, or electricity and from the transmitting of telegraph and telephone messages "for domestic or commercial consumption and not for resale". (Act cited, Sec. 1.)

Section 6 of the *first* act was as follows:

> "If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited *against any tax due, or to become due, under this Act* from the public utility which made the erroneous payment, or such amount shall be refunded to such public utility by the department." Approved June 27, 1935; in force July 1, 1935. (Italics ours.)

It will be immediately observed that the only credit authorized by the section in question is the credit allowed

> "against any tax due or to become due *under this Act.*"

Of course, petitioner does not and cannot contend that there are any taxes due

> "under *this Act,*"

that is, under the *first* act, since the taxing provisions of that act have been held unconstitutional by the Supreme Court of Illinois.

Therefore Section 6, as it was originally enacted as a part of the *first* act, cannot possibly purport to authorize the credit of taxes erroneously paid under that act as against taxes to become due under an act which was not passed until approximately two years later. Certainly at the time the legislature enacted the original act in 1935 it could not reasonably have anticipated that that act would be declared unconstitutional, since if it had anticipated such a result the act in question would never have been enacted at all.

By the same line of reasoning, it will be seen that the legislature could not possibly have intended, when it passed the 1935 act, that payments to be made under the provisions of *that* act should form the basis for credits against taxes to accrue in the future under the provisions of taxing acts which had as yet neither been enacted or even contemplated.

In view of this background we submit that the conclusion is inescapable that when the 1935 legislature expressly provided that credits on account of taxes paid under *that* (original) act should be permitted as against taxes due or to become due

"under *this* Act,"

it meant just what it said and no more, that this terminology is binding upon the courts, and that therefore, even if we assume that Section 6 of the original act of 1935 is still in full force and effect, (which is *not* true) even under the wording of that original provision the plaintiff is *not* entitled to credit taxes paid under the original invalid taxing act of 1935 as against taxes accruing under the subsequent taxing act of 1937, as plaintiff here attempts to do.

(b) Even Were That Section Still in Existence, It Would Only Permit the Recovery of Taxes Which the Legislature Did Not Intend to Impose Under That Act, Not Taxes Which the Legislature Did Intend to Impose But Failed to Impose Effectively Because the Act Proved to Be Unconstitutional.

Respondent contends under this subdivision that Section 6 of the *first* Public Utility Tax Act intended to authorize refunds only of taxes paid erroneously according to the *intent and meaning* of that act; that Section 6 of that act is utterly meaningless unless it is read in the contemplation of the provisions imposing the tax with respect to which the legislature intended to provide refunds; and that when the act as a whole (including the unconstitutional taxing provisions) is thus read in order to impart meaning to the refund provision as the Supreme Court of Illinois in *People, ex rel. Swartchild* v. *Carter,* 376 Ill. 590, held must be done, it is clear beyond all reasonable dispute that the legislature intended to authorize only refunds of taxes the payment of which was erroneous *according to the standards expressed in the act.*

In other words, it is the respondent's contention that it is only amounts which, *according to the provisions of the act,* the legislature did *not intend* to authorize the Department of Finance to collect, that it meant to refund by crediting such payments against future taxes to become due under the same act. If any substantial question exists as to whether the legislature intended to refund *all* taxes collected under the present act (by crediting them against future taxes to become due under the same act, when, if the act as a whole was unconstitutional, no such taxes could possibly become due) the following reflections should conclusively resolve such questions:

The first Public Utility Tax Act is, in its general conception and structure, modeled upon the Illinois Retailers' Occupation Tax Act. It was clearly intended to supple-

ment the Retailers' Tax Act after the Supreme Court of Illinois had held that gross receipts from the sale of electricity were not taxable under the Retailers' Tax Act (*Peoples Gas Light Co.* v. *Ames*, 359 Ill. 152). The refund provisions of the first and second Public Utility Tax Acts are drawn in language almost identical with that of the corresponding provisions of the Retailers' Occupation Tax Act. (See *Retailers' Occupation Tax Act*, section 6.)

Section 1 of the first Public Utility Tax Act (Laws of Illinois, 59th G. A., 1935, p. 1194, 1935 Revised Statutes, chap. 120, sec. 454) contained statutory definitions of such terms as "gross receipts", "public utility", "transmitting telegraph or telephone messages", and the like. The second section imposed a tax upon "each public utility," the tax being measured by gross receipts derived from

> "the conduct of the business of transmitting telegraph and telephone messages and of distributing, supplying, furnishing or selling water, gas or electricity to persons for domestic or commercial consumption and not for resale."

That section contained an express exemption

> "with respect to any transaction in interstate commerce or otherwise which transaction may not under the constitution and statutes of the United States be made the subject of taxation by this state."

Experience with revenue measures in general and with acts imposing taxes upon "gross receipts" derived from "engaging in business" in particular had demonstrated that it is quite impossible to draft such an act in terms at once sufficiently generic to comprehend within the scope of such terms the subject matter of the tax, and sufficiently particular and detailed to avoid difficult questions of law with respect to the persons, transactions, and receipts intended to be subjected to the act.

Had the act stood the test of constitutionality, questions must inevitably have arisen, for example, as to what con-

stituted a "public utility", what transactions amounted to a "sale of gas, water or current" for "domestic or commercial consumption", when such consumption was "not for resale", and when gas, electrical energy, or water transmitted into the state in interstate commerce ceased to flow in such commerce and became subject to the revenue powers of the State of Illinois. The Supreme Court of Illinois has been confronted with a great press of similar questions under the Retailers' Occupation Tax Act. Had the first Public Utility Tax Act been enforced according to the legislative intent, many utilities would necessarily have paid taxes under an erroneous interpretation of its provisions.

Moreover, mistakes of pure fact would have been certain to occur. Errors in metering, bookkeeping, and ascertaining the intended purpose of gas, electricity, and water would have resulted in the overpayment of taxes to the state.

The legislature obviously enacted the first act in the belief that it would be sustained as constitutional. The legislature no doubt contemplated errors of law and fact in its administration and enforcement, but it cannot reasonably be supposed to have anticipated that the entire act would be declared invalid. It is very clearly the sort of mistake of law or fact indicated above—that is, a mistake in the ascertainment of facts and the application of the meaning of the act to those facts—that the legislature had in mind when it provided for the correction of such mistakes by refunds or credits under Section 6 of that act.

As absolutely conclusive that the legislature intended to refund only taxes paid erroneously according to the intent and meaning of the taxing provisions of the first act, even though those provisions were later determined to be unconstitutional, we cannot emphasize too strongly the following observation:

Since the legislature has not appropriated funds for

rebates in cash of taxes paid under the first act, the only refunds possible would be those authorized to be made effective by credits against taxes to become due under the taxing provisions in question. But if those taxing provisions were unconstitutional, **no taxes would ever become due under them.** Therefore, to hold that the legislature intended to refund *all* taxes paid under the first act by applying them against future taxes to become due under that act would be to impute to the legislature the completely absurd intent to refund taxes which were not due by crediting them against taxes which never would become due.

Our interpretation of the provision in question is clearly in accord with the express language employed by the legislature in section 6 of the *first* act (Laws of Illinois, 59th G. A., 1935, p. 1179; 1935 Revised Statutes, Chap. 120, Sec. 455), which provided as follows:

> "If it shall appear that any amount of tax, penalty or interest has been paid *which was not due under the provisions of this Act,* whether as a mistake of fact or an error of law, *then* such amount shall be credited against any tax due, or to become due under this Act from the public utility which made such erroneous payment, or such amount shall be refunded to such public utility by the Department." (Italics ours.)

It will immediately be appreciated that this section purports to permit credits *only where the amounts which were collected were not due under the provisions of this Act.* No remedy was granted permitting credits as to sums *which were due under the provisions of this (the first) Act* but which provisions were subsequently held invalid.

Our view of this statutory provision is substantially the view recently (December 29, 1941) taken by the Supreme Court of Utah in the case of *Shea* v. *State Tax Commission,* 120 Pac. (2d) 274. There the statutory remedy provided

(Laws of Utah, 1935, Chap. 46, Sec. 149, p. 108) was as follows:

> "Whenever the department through error collects any fee *not required to be paid hereunder* the same shall be refunded to the person paying the same upon written application therefor made within six months after date of such payment." (Italics ours.)

A certain portion of the taxing act, assessing a mileage tax against diesel powered trucks, was held invalid and unconstitutional on the ground that it was beyond the scope of the title of the act which said nothing about revenue, and the plaintiff sought a refund of such taxes under the section above quoted on the theory that a collection under the terms of a void provision is a collection "through error" and one "not required to be paid hereunder" in the words of the refund provision.

In refusing relief, the Supreme Court of Utah, at pages 275 and 276, said:

> "We cannot suppose that in enacting the law the legislature that in contemplation of its enactments were unconstitutional. * * * Words 'erroneously paid,' relating to refunding of taxes paid cannot be applied to payment of any tax which for 'any' reason is invalid, but must be taken in ordinary sense of mistakenly paid, and were clearly intended to cover cases where payment was made under misapprehension as to what was being paid. *Security National Bank* v. *Twindle, et al.*, 52 S. D. 352, 217 N. W. 542. The section as to refunds there considered was held to apply only to collections which the officials themselves have determined at the time of collection that they should not collect, such determination to be made as a matter of fact and not of law."

In view of the foregoing considerations, it is respectfully submitted that even if Section 6 of the original act of 1935 were still in full force and effect, and even if it could be construed so as to authorize the crediting of payments under the 1935 act as against taxes accruing under the 1937

act (*neither* of which assumptions is true), it would only authorize the recovery of taxes which the legislature *did not intend to impose* under the taxing provisions of the 1935 act, and *not taxes which it did intend to impose* under the provisions of that act but failed effectively to impose because the act proved to be unconstitutional.

Applying this test to the facts in the case at bar, it is clear that the legislature *did intend to impose the very tax which the petitioner here seeks to recover*, and that therefore no relief may be predicated upon the provisions of Section 6 of the Act of 1935.

(c) Even Assuming That the Provisions of Section 6 of the 1935 Act Were Sufficient in Scope to Justify Relief in This Type of a Case, Those Provisions Were Completely Obliterated by the Illinois Supreme Court's Holding That the Act of Which They Formed a Part Was Unconstitutional and Void.

The *first* Public Utility Tax Act of 1935 was held unconstitutional and void in the case of *City of Chicago* v. *Ames*, 365 Ill. 529. It should be noted, at the very inception of this portion of the argument, that the Court did not there hold merely that, as applied to the plaintiffs in that case, the act in question was unconstitutional and void. On the contrary, the Court, at pages 536 and 537, seems to take the position that the act is void as an integrated entirety and that therefore the plaintiffs could challenge its validity, even though the particular provision there specifically attacked might not directly affect them.

The general rule with respect to the effect of a decision holding a particular statute to be unconstitutional and void is well stated in 12 Corpus Juris at page 801, where it is stated that:

> "No rights may be based on, nor may duties be imposed by, an unconstitutional statute. This rule applies to any part of an act which is found to be unconstitutional."

The only exception to this general rule is where some particular section is not actually integrated into the act in question but is of such an independent and severable character that the Courts will presume that the legislature, even had it known that the balance of the act was unconstitutional and void, would, nevertheless, have passed the specific section in question as an independent enactment.

This principle is well stated in the case of *Springfield Gas Co.* v. *Springfield,* 292 Ill. 236, in which the Supreme Court of Illinois, at pages 243 and 244, took occasion to say:

> "While it is well settled by adjudications of this and other courts that if different sections of a statute are independent of each other, that which is constitutional may be disregarded and valid sections be permitted to stand and be in force, yet it is also the inflexible rule that where a portion of an act is valid and a portion invalid, *and the court cannot say that the Legislature would have passed the act with the invalid portion eliminated, then the entire act must be held invalid. People* v. *McBride,* 234 Ill. 146; *Cornell* v. *People,* 107 id. 372; *Hinze* v. *People,* 92 id. 406; *People* v. *Cooper,* 83 id. 585; *Matthews* v. *People,* 402 id. 389; *Kellyville Coal Co.* v. *Harrier,* 207 id. 624." (Italics ours.)

Another excellent statement of this rule is to be found in the case of *People ex rel. Hoyne* v. *Olsen,* 204 Ill. 494, where the court, at page 497, said:

> "The rule is: 'If a statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other; but if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion, and if they are so mutually connected with and dependent on each other, as conditions, consideration, or compensation for each other, as to warrant the belief that the legislature intended them as a whole, and that *if all*

> *could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.'* (Cooley's Const. Lim., pp. 178, 179.)'' (Italics supplied.)

The principle enunciated in the foregoing language is of course familiar learning. We perceive no useful purpose to be served by multiplying citations to the same effect. Similar expressions will be found in *People* v. *Union Bank and Trust Company,* 362 Ill. 164, where the court quotes language to the same effect from *Cooley's Constitutional Limitations* as well as from other authorities.

The cases cited by petitioner do not challenge but on the contrary support the rule as above stated. Let us therefore examine the provisions of the 1935 act to ascertain whether or not it is reasonable to presume that had the legislature realized at the time it passed the act in question, that the tax thereby imposed would fail as unconstitutional, it would, nevertheless, have enacted Section 6 of that act as an independent enactment.

It is too plain to admit of argument that the legislature would *not* pass an act authorizing the refund of taxes if it has passed no act imposing such taxes. Section 6, if enacted apart from the taxing provisions of that same act, would be pure nonsense. An act purporting to refund taxes which had not been levied would never pass both houses of the legislature and receive the governor's approval. It is therefore clear that the refund provisions were inseparable from the taxing provisions.

We respectfully but earnestly insist that the question of whether petitioner and all other public utilities in the State of Illinois are entitled to a refund of all of the taxes paid during a period of eighteen months depends wholly upon the creation of such a right to a refund by the legislature and not by the Department of Finance or by this court.

Under an unquestioned rule, so fundamental as to be a primary axiom of American jurisprudence, one provision of a statute will *not* be sustained as constitutional when the other provisions are unconstitutional unless the court can fairly say that the legislature would have passed it as a separate and independent act, had it known that such other provisions would be declared invalid. It is too obvious to admit of the slightest doubt that the legislature would not have passed an act contemplating the refund of taxes unless it had thought that it had the power to pass the taxing act in the first place. A departure from this rule by the courts would constitute a usurpation of the function of the legislative branch of government. Appellee therefore maintains that Section 6 of the first act cannot be upheld as an independent enactment.

Even if it be assumed (*contrary* to the facts), that the legislature would have passed Section 6 of the original act of 1935 as an independent enactment, there would be considerable doubt as to its constitutionality.

The petitioner takes the position that the Supreme Court of Illinois has held, in the fairly recent case of *People ex rel. Swartchild* v. *Carter*, 376 Ill. 590 (1941), that an identical refund section of the Retailers' Occupation Tax act was valid and constitutional. This is not at all accurate.

In the *Swartchild* case, the Supreme Court of Illinois did *not* hold that the refund section of the Retailers' act, standing alone, would be valid and constitutional, but *on the contrary,* strongly implied that such a section, standing alone without the other provisions of that act, would probably be *invalid.* All that the court there held, as respects that particular section, was that *as supplemented by the other provisions of that admittedly valid act,* the section in question was valid and constitutional, saying, at page 592, as follows:

> "It is claimed that section 6 is unconstitutional because it delegates judicial power to an administrative

board, and because there are no procedural requirements set up in section 6 requiring a hearing. *If section 6 were a separate and independent act of legislation, this argument might be persuasive. However,* this section is but a part of a general statute consisting of fifteen or more sections. It is comprehensive in its scope. * * *

"*The entire act, including all the sections,* must be construed together to ascertain the intent of the legislature. The act, as a whole, has been held constitutional." (Italics ours.)

It thus strongly appears that in so far as the Illinois cases are concerned, Section 6 of the 1935 Act would not stand alone for at least *two* reasons, *first*, the legislature would never have passed it as an independent piece of legislation, and, *second*, even if it had, it would probably have been invalid because it would not be supplemented by the balance of the act of which it was a part.

(d) Even Had Section 6 of the 1935 Act Survived as an Independent Enactment, It Would Have Been Automatically Repealed by the Legislature's Enactment of a Complete New Act in 1937.

After the 1935 Public Utility Act had been held unconstitutional in the case of *City of Chicago* v. *Ames*, 365 Ill. 529 (decided Feb. 12, 1937) the legislature, by an act approved March 11, 1937 (Laws of Illinois, 1937, pp. 1052-57), promptly took notice of that holding and replaced the Act of 1935 with a complete, new act which expressly recognized, in Section 16, that "the Public Utility Tax Act, approved June 27, 1935, has been declared unconstitutional" and that the new act was intended to take its place as a principal source of revenue to be used for relief purposes.

This new Act of 1937 was, in its scope and provisions, as complete and comprehensive as the earlier act had been and was definitely intended as a complete new piece of legislation, designed to take the place of and supersede the earlier invalid act, and not merely to amend or sup-

plement the earlier act. It did, however, omit certain provisions of the earlier act relating to sales of *water*, and the new act, therefore, purported to levy a tax measured only by such receipts as were derived in connection with telegraphs, telephones, gas and electricity.

It is a well established rule of law that where the legislature enacts a comprehensive revision of the prior law respecting a certain subject matter such an act automatically repeals all prior enactments respecting that same subject matter, without the use of any express words for that purpose, *except* in so far as the subsequent act substantially re-enacts the earlier law, in which case the earlier remedy is considered as having been continuously in force, but only as respects such persons as qualify *under both the old and the new version of such a remedy.*

This principle is well stated in the case of *Merlo* v. *Coal and Mining Co.*, 258 Ill. 328. In that case the plaintiff was the widow of an employee who had lost his life in the service of an employer and after a judgment in her favor in the trial court had been rendered the statute was revised.

There the Court took the view that she was entitled to a recovery *both under the provisions of the earlier and later statutory provisions*, saying at page 345:

> "In the case at bar the deceased left only a widow, who would be entitled, *under either statute*, to the entire amount of the recovery. (*Beard* v. *Skeldon*, 113 Ill. 584; *Willis Coal and Mining Co.* v. *Grissell*, 198 id. 313.)" (Italics ours.)

Obviously, then, as to her, the latter amendment was not a repeal but a mere continuation of the earlier remedy.

In discussing the legal principles governing such cases, the Court, at pages 333 and 334, said:

> "Statutes may be repealed in whole or in part by amendment. If the legislature enacts an amendatory statute providing that a certain act or a certain section of an act shall be amended so as to read as the same is

> repeated in the amendatory act, *all such portions of the old act or section as are not repeated in the new act are repealed without any express words for that purpose* (*Moore* v. *Mausert,* 49 N. Y. 332; *Breitung* v. *Lindauer,* 37 Mich. 217); but such portions of the old law as are retained, either literally, or substantially, are regarded as a continuation of the old law and not as a new enactment. (Hurd's Stat. 1911, Chap. 131, sec. 2; *Cushman* v. *Bonfield,* 139 Ill. 219, Lewis' Sutherland on Stat. Const., sec. 237, and cases there cited.) Statutes may also be repealed by a general revision. Where the law on a particular subject is revised and rewritten, only *the provisions of the old law which are omitted from the revised act are repealed* and all provisions of the old law retained in the new act are regarded as having been continuously in force. (*Mette* v. *Feltgen,* 148 Ill. 357.) The rule in respect to repeals by revision is the same as repeals by amendment. There is no hiatus between the death of the old and the coming of the new law." (Italics ours.)

Another case illustrating this long established principle is *People* v. *Lindheimer,* 371 Ill. 367. There the statute was revised and the plaintiffs contended that the new act merely continued and did not repeal the earlier statutory remedy. The Court, however, took a different view and denied relief, saying, at page 375:

> "Section 1 of the Act of 1935 provides for a refund or credit where judgment is entered affecting twenty-five per cent or more in number of the properties, *but it is not shown or claimed that appellees come within that provision, and so far as they are concerned the repeal is absolute.* * * * There are different methods by which a prior statute may be repealed, *i. e.,* by express declaration, or by implication *or through amendment* or revision." (Italics ours.)

This is also the rule in other States. In the case of *Moore* v. *Mausert,* 49 N. Y. 332, the Court of Appeals of New York took the position that even where a statute is "amended so as to read as follows" etc., a failure to sub-

stantially re-enact an earlier provision of the statute so amended, repeals those portions so omitted without expressly so stating, saying, at page 335:

> "In *Ely* v. *Holton* (15 N. Y. 595), it was decided by this court that the effect of an amendment of a statute made by a subsequent statute declaring that such statute shall be amended so as to read as follows, retaining a part of the statute amended and incorporating therein new provisions, was not to repeal the part retained and re-enact the same, but that such part of the statute continued in force from the first enactment, and that the new provisions incorporated became operative from the time the amendatory statute took effect. *It would follow that, where certain provisions of the original statute were omitted from the amendatory statute, such provisions were abrogated and ceased to form any part of the statute after such time.* Applying these principles to the present case, it follows that * * * the provision for filing notice in the office of the town clerk of the town, in the fourth section, being left out of the section as amended, was abrogated at the same time."

In the case of *Breitung* v. *Lindauer,* 37 Mich, 217, the Supreme Court of that State, in speaking of the effect of a subsequent amendatory act upon an earlier statute, at page 233, said:

> "The rule is that the latter act operates *to the extent of the repugnancy,* as a repeal of the first, or, if the two acts are not in express terms repugnant, yet if the latter *covers the whole subject of the first,* and contains new provisions showing that it was intended as a substitute, it will operate as a repeal. *U. S.* v. *Tyneu,* 11 Wall. 92." (Italics court's.)

In view of the general principles above stated, we submit that since, *after* the 1935 act had been held unconstitutional by the Supreme Court of Illinois, the legislature enacted a new piece of legislation, not only comprehensive in its scope and complete in its provisions but expressly disclosing on its face that it was intended to take the place

of and supersede the earlier act, the provisions of Section 6 of the 1935 Act were repealed by necessary implication, unless the plaintiff can establish that it is entitled to relief under the refund provisions of the subsequent act of 1937.

II.

THE ONLY QUESTIONS DECIDED BY THE SUPREME COURT OF ILLINOIS WERE QUESTIONS OF ILLINOIS STATUTORY LAW. NO QUESTION OF FEDERAL CONSTITUTIONAL LAW WAS PRESENTED TO THE COURTS BELOW, NOR IS ANY SUCH QUESTION PRESENTED HERE.

Under the preceding Point, the respondent has argued the questions of the construction and proper intendment of the Illinois acts of 1935 and 1937, respectively, very much as though the question of such construction was properly before this court as a question of first impression. However, the question is really *not* a question of federal law, but is purely a question of the construction of statutes of the State of Illinois. The Supreme Court of Illinois has definitely and conclusively held that the acts in question did not support a construction entitling the petitioner to a credit as against taxes under an act passed in 1937, of amounts paid under an act passed in 1935.

It certainly cannot be seriously contended that this construction of Illinois statute does violence to any canon of due process of equal protection of the law.

If this court were to reverse the decision of the Supreme Court of Illinois (and of course, if the Statute of Limitations had not now intervened) the consequence would be that as to almost every utility in the State of Illinois, no taxes could be collected under the 1937 act until taxes assessed under that act had exceeded amounts paid under the 1935 act. Such construction would (if its practical operation were not now barred by the Statute of Limitations) have completely frustrated the revenue policy of

the *second* act. The legislature was not bound by any constitutional mandate to provide, as to a tax to be levied in the future, that payment might be made in any medium other than money. Certainly it was not bound to provide that moneys unconstitutionally collected in the past should be credited against any specific tax in the future.

Moreover, petitioner did not rest its claim upon any federal constitutional ground until its petition for rehearing. It is not deemed necessary to cite authority for the proposition that a court of review is not bound to take cognizance of contentions made for the first time upon petition for rehearing.

Still another consideration, which, respondent submits, is decisive of the question whether a federal constitutional point is involved here, is the following:

Petitioner has rested its case on Section 1 of the 14th Amendment, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

But this court has repeatedly held that a municipality cannot claim the protection of the 14th Amendment against the act or failure to act of its author, the state.

In the case of *Trenton* v. *New Jersey,* 262 U. S. 182, the City of Trenton asserted that the State, by enacting a statute charging the city fees for water which it diverted from streams for the municipal water supply, took "property owned by the City in its private or proprietary capacity for public use without just compensation and without

due process of law in violation of the Fourteenth Amendment."

This court, in deciding the controversy adversely to the city, said at page 187:

> "A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will. * * *
>
> "In *Mount Pleasant* v. *Beckwith*, 100 U. S. 514 * * * it is said (pp. 524-5):
>
> "'Institutions of the kind, whether called cities, towns or counties, are the auxiliaries of the State in the important business of municipal rule: * * *.'
>
> "The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned."

In the same case, this court discussed the distinction sometimes made between acts of a municipality in its governmental capacity, and its acts in a proprietary capacity. The court then continued on page 192:

> "But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. *They do not apply as against the State in favor of its own municipalities.* * * * In view of former opinions of this court, no substantial federal question is presented."

The *Trenton case* was followed in another case decided on the same day, and reported in the same volume, *Newark* v. *New Jersey*, 262 U. S. 192. In that case this court, citing its previous decision, said at page 196:

> "The city cannot invoke the protection of the Fourteenth Amendment against the State."

Another case, cited in the Trenton opinion, is *Hunter* v. *Pittsburgh*, 207 U. S. 161. The grievance of the peti-

tioners in that case was a statute of Pennsylvania which consolidated two cities. The petitioners alleged at page 169:

> "The Act of Assembly under which this petition is filed is in conflict with Article XIV of the amendments to the Constitution of the United States, because the said annexation of the City of Allegheny to the City of Pittsburgh deprives your respondents of their property without due process of law."

This court, however, denied that a municipality could claim the protection of the 14th Amendment as against the state whose creature it was, since

> "there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

The principle that a municipality cannot invoke the Fourteenth Amendment to forestall an act of the state which created it has been followed not only by this court, but by state tribunals as well. A leading case is *Shelby* v. *City of Pensacola*, 151 So. 53 (Fla., 1933).

In that case, the Florida legislature having changed the status of municipal civil service employees, and one of them having sued the City of Pensacola under that statute, the City defended by asserting that the statute violated the Fourteenth Amendment.

The Supreme Court of Florida said at page 55:

> "It is an established principle of constitutional law that those constitutional restraints imposed by the federal constitution against state action do not apply against the state in favor of its own municipality in so far as equal protection of the laws and due process of law under the Fourteenth Amendment are concerned. *Trenton* v. *New Jersey*, 262 U. S. 182.
>
> "As a protection of the liberty and property rights of persons against adverse legislative action on the

part of the *state*, the clauses of the 14th Amendment to the Constitution of the United States which declares that no *state* shall deprive any *person* of life, liberty or property without due process of law, nor deny any *person* within its jurisdiction the equal protection of the laws, have never been held applicable to municipal corporations, on the theory that such public corporations are '*persons*' within the purview of the language of the 14th Amendment.

"Indeed, in only two cases has the contention ever been put forward in the United States Supreme Court that the equal protection clause of the 14th Amendment to the United States Constitution was so applicable; *Williams* v. *Eggleston*, 170 U. S. 304; *Mason* v. *Missouri*, 179 U. S. 328; and in each of these cases the contention was, as might have been expected, summarily denied, because had the court ruled otherwise, the whole complex subject of the reasonableness of classifications for the purpose of creating municipal governments under charters granted by state legislatures would have become thereby a federal question."

Other state cases holding that the state legislature is not restrained in its dealings with its own municipalities are: *Riley* v. *Stack*, 1933, 18 P. 2d 110, 72 Cal. App. Dec. 116; *St. Louis* v. *Shields*, 52 Mo. 351, 354; *Police Jury of Bossier* v. *Corporation of Shreveport*, 5 La. Ann. 661, 665; *Trustees of Schools* v. *Tatman*, 13 Ill. 27; *Board of Education* v. *Aberdeen*, 56 Miss. 518; *Darlington* v. *City of New York*, 31 N. Y. 164, 193.

Respondent submits, therefore, that no federal question is before this court, since petitioner did not introduce any such question at a stage of the proceedings where the Supreme Court of Illinois was bound to consider it, and even if petitioner had properly suggested such a question, there nevertheless can be no invocation of the 14th Amendment by a municipality against the state which created it.

Conclusion.

In view of the foregoing considerations, we respectfully submit that petitioner is not entitled, under the constitution or otherwise, to credit taxes paid under one act against taxes to become due under a later act, since neither act authorized any such credit; since even if the first act had given such authority it was completely obliterated when the Supreme Court of Illinois held it unconstitutional; and since, even if the first act giving such authority had not as to that particular provision, been held invalid, even so it would have automatically been repealed by the enactment of the new and complete second statute. We further submit that, aside from the above, no federal question is raised upon this record since a municipality cannot claim the protection of the 14th Amendment against the state which created it.

We therefore respectfully pray that this Court dismiss the petition for writ of *certiorari*.

Respectfully submitted,

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